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November 17, 2021

**VIA ELECTRONIC FILING**

The Honorable Jocelyn G. Boyd  
Chief Clerk/Executive Director  
Public Service Commission of South Carolina  
101 Executive Center Drive, Suite 100  
Columbia, South Carolina 29210

Re: Generic Docket to Study and Review Prefiled Rebuttal and Surrebuttal  
Testimony in Hearings and Related Matters  
Docket No. 2021-291-A

**Comments of Blue Granite Water Company**

Dear Ms. Boyd:

Pursuant to Directive No. 2021-736, I am writing on behalf of Blue Granite Water Company (the "Company") to submit the following comments on pre-filed rebuttal and surrebuttal testimony in matters before the Commission. The Company's comments are intended to streamline disputed issues before the Commission in contested cases, to ensure parties and the Commission have sufficient time to prepare questions and answers on critical issues in advance of a hearing, and to promote procedural fairness for all parties involved.

**Pre-Filed Rebuttal Testimony**

The Company believes the Commission should continue to require parties to pre-file rebuttal testimony for at least three reasons.

*First*, requiring pre-filed written rebuttal testimony is consistent with the General Assembly's overall intent for Commission proceedings. See S.C. Code Ann. § 58-3-140(D) (requiring the Commission to "promulgate regulations to require the direct testimony of witnesses appearing on behalf of utilities and of witnesses appearing on behalf of persons having formal intervenor status, *such testimony to be reduced to writing and prefiled with the commission in advance of any hearing*" (emphasis added)); see also *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the [General Assembly].").

This practice is also consistent with the Commission's current rules and regulations. See S.C. Code Ann. Regs. 103-845(C) ("In proceedings involving utilities, the Commission shall require any party and the Office of Regulatory Staff to file copies of testimony and exhibits and serve them on all other parties of record within a specified time in advance of the hearing."). Changing the practice would require



the Commission to engage in rulemaking under the Administrative Procedures Act. See *Home Health Serv., Inc. v. S.C. Tax Comm'n*, 312 S.C. 324, 329, 440 S.E.2d 375, 378 (1994).

*Second*, pre-filed rebuttal testimony helps bring into focus contested issues well in advance of a hearing, allowing parties to prepare their cases accordingly and to streamline the issues before the Commission. The Company believes pre-filed rebuttal testimony is especially important for addressing issues that intervenors raise in their direct testimony. Given the complexity of the issues, having sufficient time to prepare is important for both the parties and the Commission. Handling these issues on the fly, however, does not allow for such preparation, which hinders the parties' ability to provide thoughtful analysis for the Commission.

*Third*, to that end, requiring pre-filed rebuttal testimony promotes procedural fairness for all involved and avoids creating a situation in which important and complex issues arise for the first time on cross-examination during a hearing. Stated differently, it promotes due process and discourages a trial by ambush. See S.C. CONST. art. I, § 22 (guaranteeing due process before administrative agencies and quasi-judicial tribunals); *CEL Prod., LLC v. Rozelle*, 357 S.C. 125, 132, 591 S.E.2d 643, 646 (Ct. App. 2004) (observing discovery is designed to "mandate full and fair disclosure to prevent a trial from becoming a guessing game or one of ambush for either party" (quoting *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 652, 579 S.E.2d 151, 158 (Ct. App. 2003))). Relegating rebuttal evidence to live testimony at a hearing, on the other hand, could encourage procedural gamesmanship and leave parties with insufficient time to address, properly object to, or offer evidence in support of critical issues raised for the first time in the case.

### Pre-Filed Surrebuttal Testimony

As the Supreme Court of South Carolina has recognized, "[t]he opportunity to present surrebuttal evidence is discretionary with the Commission." *Palmetto All., Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 439, 319 S.E.2d 695, 700 (1984). In practice, however, surrebuttal has seemed to become the norm.

Allowing for universal surrebuttal evidence butts heads with a fundamental precept in civil practice that the party who shoulders the burden of proof has the right to open and close the presentation of evidence. *E.g., Daniel v. Tower Trucking Co. Inc.*, 205 S.C. 333, 351, 32 S.E.2d 5, 10 (1944). Some intervenors have misused surrebuttal to raise matters that should have been addressed in their pre-filed direct testimony. But this leaves the applicant or petitioner with almost no opportunity to prepare a proper response or defense to the newly introduced testimony.

Indeed, this practice raises yet another concern: it conflicts with the Commission's existing regulations. See S.C. Code Ann. Regs. 103-829 & -833. When surrebuttal testimony is pre-filed merely days before a hearing, the opposing party cannot



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possibly meet the 10-day requirement for issuing discovery or filing motions in advance of a hearing. In other words, the opposing party has no meaningful opportunity to respond to the new evidence, raising serious due process concerns. See *Utils. Servs. of S.C. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 107, 708 S.E.2d 755, 761 (2011); S.C. CONST. art. I, § 22.

Instead of regularly allowing surrebuttal testimony, the Commission should clarify it remains discretionary and, even then, limited. *Palmetto All., Inc.*, 282 S.C. at 439, 319 S.E.2d at 700; see also *Camlin v. Bi-Lo, Inc.*, 311 S.C. 197, 200, 428 S.E.2d 6, 7 (Ct. App. (1993) (“A defendant has a right to respond to new evidence given in reply.”). Given the procedural inefficiencies and serious due process concerns implicated by surrebuttal testimony, the Company respectfully submits that the Commission should continue to evaluate its necessity and scope on a case-by-case basis.

The Company appreciates the opportunity to offer comments on this important issue for the Commission’s consideration.

Very truly yours,

Vordman Carlisle Traywick, III

VCT:tch

cc: Parties of Record (via email)